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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DONALD ALHANATI et al.,

Plaintiffs and Appellants,

v.

KAMRAN AKHAVAN,

Defendant and Respondent.

G042162

(Super. Ct. No. 07CC10879)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Briggs & Alexander and Peter D. Sunukjian for Plaintiffs and Appellants.

Sterling S. Hathaway, Floyd F. Fishell, Morrow & White and Christopher White for Defendant and Respondent.

Donald Alhanati and his wife, Kristine Callina (hereafter collectively and in the singular “Alhanati,” unless the context indicates otherwise), appeal from the judgment in their action against a building contractor, Kamran Akhavan, arising out of work he performed on their home. They contend a city inspection record was erroneously admitted into evidence. We find Alhanati has failed in his burden to prove any prejudicial error and, accordingly, affirm the judgment.

FACTS

Alhanati elected to proceed on an appellant’s appendix (Cal. Rules of Court, rule 8.124). The appendix he has provided contains only the following documents: the judgment, the notice of entry of judgment, the notice of appeal, the notice of election to proceed by way of appellant’s appendix, and a register of action. Alhanati did not file the notice required by California Rules of Court, rule 8.224, designating any original trial exhibits to be transmitted to us for consideration, nor have we been provided with any original trial exhibits.

Having none of the pleadings filed in this case, we are left to deciphering the causes of action from the judgment. It indicates that following a jury trial that began on September 8, 2008, the jury returned a special verdict finding Alhanati failed to prove Akhavan made false representations, breached the contract in any material way, or performed below the standard of care for a licensed contractor. However, after a court trial on September 17, on Alhanati’s “claim under Labor Code §§ 3700 et seq.,” the court found Akhavan was liable to Alhanati for damages of \$265,744.¹ Accordingly, judgment in Alhanati’s *favor* in that amount was entered against Akhavan.

Alhanati has provided us with a reporter’s transcript from the jury trial but not from the court trial that followed. In Alhanati’s statement of facts, he discusses only the testimony of his expert witnesses. He makes no mention of the extensive testimony

¹ Labor Code section 3700 et seq. are the statutes requiring an employer to obtain workers’ compensation insurance.

of Akhavan or another witness Akhavan called. Alhanati also does not discuss his own testimony, that of Callina, or that of their architect. We have reviewed the record and summarize the trial testimony here.

Plaintiffs' Case

Alhanati contracted with Akhavan to remodel his Lake Forest home for \$242,000. The contract required Akhavan to follow the architect's plans. Alhanati's wife, Callina, followed the daily progress. She was unhappy with the progress of the renovation and testified about various problems including: installation of a small electric fireplace instead of a recessed stone fireplace (Akhavan testified there was not sufficient room along the property line to accommodate the larger fireplace); installation of five-foot sliding glass doors instead of six-foot sliding glass doors (Akhavan fixed the error by putting in new six-foot doors and credited the cost of the old doors to Alhanati); a bedroom closet that was not built deep enough (Akhavan testified because as designed, the closet would negatively impact usable space in the bedroom, he proposed an alternative, done at no extra charge, and Callina had approved); the master bathtub was pushed too far into the corner (the tub Callina bought was much larger than the one originally planned for the space).

Callina testified to problems in the kitchen. The cabinets she bought did not fit once construction was done, so she had to order more, and kitchen appliances were installed in the wrong places. But she agreed both were due to plan changes she approved. One time during construction there was a sewer back up onto the floors in the kitchen, spa bathroom, and the media room, but after the pipe was unclogged, there were no further sewer problems. Callina, Alhanati, and their architect put together an extensive "punch list" of problems throughout the house. Akhavan said he would address the problems but did not.

Callina testified she expected the project to be done in three to four months, but it took over a year. She testified Akhavan and workers disappeared and Akhavan

never called or sent letters demanding further payment. Akhavan's work was shoddy and Callina had to hire an electrician to finish parts of the job.

The architect, who had recommended Akhavan, testified he thought this was supposed to be a "shell and a core" job based on Akhavan's contract price (which was much lower than any other contractor's) and his prior experience with Akhavan. A "shell and a core" job was one where the contractor builds only what is necessary to pass final building inspection, and the homeowner is responsible for anything fancy or expensive. Although the architect came up with an extensive punch list, he thought Akhavan likely thought he was done with the job. The punch list items were little things that had nothing to do with structural integrity. The architect explained "[t]his is more of a situation of workmanship, not whether the contract was completed or not, or whatever agreement they had." The only punch list item that caused him major concern was a guardrail that could present safety issues and code violations.

Alhanati testified he did not believe he was contracting for core or shell type construction. The agreement was for a house ready to move into, other than flooring and paint. Although the contract provided kitchen cabinets and flooring were Alhanati's responsibility, Akhavan said he would do both because he could save them money by buying the kitchen cabinets and tile at cost. Alhanati was supposed to provide new doors and windows, but two windows were never replaced. Alhanati was told there was not enough room for the fireplace they wanted, and the outside stucco was not "exactly what [he] wanted, but it was close." Alhanati testified the new construction was built over one of the backyard drains allowing water to collect on the north side of the house, but he had not hired anyone to inspect for damage. Alhanati agreed he gave Akhavan the "go ahead" for the bedroom closet placement.

Alhanati talked to Akhavan on the telephone around May 5 and Akhavan said the job was finished. Alhanati told him there were still things that were not finished. Akhavan said he was done with the job. Alhanati saw the city inspection record on the

job site. He heard the final inspection was done, but not from Akhavan, and was never told by Akhavan the house was ready to move back into.

Alhanati's expert, David McCue, testified to the standard of care in the construction industry. He opined there were several problems in the master bathroom. A narrow shower entry door was a safety issue and below minimum standards, there was random cracked tile due to poor installation, and a steam shower (that had not been on the original plan) was poorly installed. The transition into the bathroom presented a trip hazard. There were grout problems that could cause further cracking and indications the concrete slab beneath the flooring was not properly sealed, which could cause further flooring problems in the future. All in all, McCue opined the standard of care in the industry was not followed.

Timothy Koos, a general contractor, also testified for Alhanati. He inspected the property and found numerous instances of doors and windows of the wrong size being installed. He opined a gap under a sliding door would allow water to run into the house. Some windows that were supposed to be replaced were not. The second floor guardrail was substandard, there was chipping in the stucco coating, and there were a variety of "fit and finish" issues. He also testified about substandard items on the outside of the house including a hairline crack off the corner of the door frame, a poor patch job around some windows, and cracks that could allow bug infestation. Koos testified he could not imagine how the work had passed inspection. He found some of the aesthetic problems, when exposed to weather, could cause structural problems, and he believed the framing of the attic was not adequate.

Defense Case

Akhavan presented testimony from Marshall Kurtz, a finish carpenter who worked with Akhavan on many projects, including the Alhanati home. Akhavan asked Kurtz to bid on the kitchen work. Alhanati accepted Kurtz's bid of \$2,800. Kurtz was not a licensed contractor, but he did not work under the general's license either. He

worked directly for Alhanati, but because he had bank problems, Alhanati wrote Akhavan a check for Kurtz's work, which Akhavan cashed for Kurtz. Kurtz installed the cabinets and appliances in Alhanati's kitchen. He re-did the cabinets five to seven times at Callina's request, always without any additional charge. Kurtz was later asked to do other carpentry work on the house, and he never heard any complaints from Alhanati about any of his work.

Akhavan testified he had been a licensed general contractor for seven or eight years. The contract with Alhanati was basically for a "shell" job in which he would build the framework of the house, including putting on a roof, building the rooms, pouring foundation, plumbing, and electrical. Alhanati was to supply the finish products, and Akhavan would install them. By February 16, 2007, Akhavan's work on Alhanati's house was 95 percent done. The owners had to install the kitchen cabinets and the counter tops so Akhavan could install the sink, finish plumbing, and finish electrical for a few specific areas.

When the framing was completed, the city inspector noted the fireplace was encroaching on the property line and gave Akhavan a correction notice. Akhavan and the architect came up with a correction plan. After explaining it to Callina, that was the end of the conversation about it.

Akhavan explained that during construction Alhanati changed the size of the bathtub and shower requiring he increase the bathroom by 12 square feet to accommodate the plumbing. He did so at no additional cost. The city inspector signed off on the plumbing work. It was not until after the shower had been built and tile was laid, that Alhanati mentioned wanting a steam shower.

In building the addition to the master bedroom, the existing floor joists were thinner than the new floor joists required by building codes, making the newly installed floor two inches higher. So as not to change the elevation of the roof with a step up, Akhavan had to make a gradual transition between the old and new construction.

Akhavan explained that when Callina decided she wanted on a double vanity on a wall in the bathroom with no plumbing, he explained the plumbing problems to Alhanati and offered a solution that included using an unattractive piece of wood covering a 90 degree turn on the drain to accommodate the additional sink. Alhanati gave Akhavan permission to do what he had to do.

Akhavan testified that in installing the tile floor in the master bathroom, he followed code procedures. He had to leave a strip of flooring unfinished because the finish depended on the flooring Alhanati ultimately chose. Akhavan testified the shower door was purchased by Alhanati, and Akhavan told him it was too narrow, but Alhanati insisted on using the door and it passed inspection. Akhavan testified the balcony guardrail was not the original railing he installed.

Akhavan testified it rained during construction, but there was never flooding by the side of the house. Everything was tested and approved by the city inspector, and the house passed final inspection.

Court Trial

Alhanati has not provided us with a reporter's transcript from the court trial on the claims on which he prevailed. We note that in discussions with the court after the jury returned its verdict, counsel and the court indicated those claims arose under the Labor Code and the Business and Professions Code, and involved allegations Akhavan's license was not legitimate. Alhanati's counsel argued that if the trial court agreed, which apparently it did, Alhanati was entitled to damages equal to all the amounts already paid Akhavan under the contract and change orders.

DISCUSSION

Alhanati raises a single issue on appeal. He contends the trial court improperly admitted, over his objection, an inspection record from the City of Lake Forest. We find no prejudicial error has been shown.

On direct examination by his counsel, Akhavan was asked about exhibit 20, the inspection record and counsel asked that the document be moved into evidence. Alhanati objected to admission of the document because “it’s a hearsay document. There is no foundation for his knowledge.” The trial court at first agreed observing “[t]he question is whether he’s adequately authenticated the document whose contents he’s personally familiar with.” Akhavan then testified he had been provided the inspection record by the architect with the plans for the house. He explained the inspection record remained at the site during construction attached to the plans. With that, the court concluded the document was admissible because it was “part of the documents that he got in the course of doing his job.”

Alhanati contends the inspection report was improperly admitted because it was hearsay and Akhavan failed to establish it fell within either the business record exception (Evid. Code, § 1271), or the official records exception (Evid. Code, § 1280), to the hearsay rule. For his part, Akhavan makes no attempt at justifying admission of the inspection record but asserts Alhanati has failed to show any prejudice. Assuming, without deciding, the inspection record was erroneously admitted, we agree Alhanati has utterly failed to demonstrate its admission was prejudicial.

A judgment may not be set aside due to the erroneous admission of evidence unless the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 353.) A miscarriage of justice may be declared only when the reviewing court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*O’Hearn v. Hillcrest Gym & Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 500.)

Generally, an appellant bears the burden of affirmatively demonstrating prejudicial error. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) “The ‘prejudicial error’ rule effectively imposes a *dual burden* on appellants: They must first

prove *error*, and then show the error was ‘prejudicial.’ The burden of demonstrating prejudice is particularly onerous in civil appeals because many (if not most) trial court errors are found to be ‘harmless.’” (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 8:291, p. 8-182.)

Alhanati’s opening brief contains no discussion of prejudice resulting from erroneous admission of the inspection record, stating only in his final paragraph “it was prejudicial.” In his reply brief, Alhanati argues admission of the inspection record was prejudicial because it was Akhavan’s only documentary evidence, and Akhavan relied on it when testifying. Alhanati thus argues absent the inspection report, there was no evidence to rebut the overwhelming evidence presented by Alhanati. That is not sufficient to demonstrate prejudice.

We start with the fact Alhanati has not properly put the inspection record before us. He did not comply with his obligation under California Rules of Court, rule 8.224 to properly request transmittal of the originals of any trial exhibits he wanted us to consider. His attachment of a photocopy of the exhibit to his reply brief is not a substitute for properly transmitting the *original* trial exhibit. California Rules of Court, rule 8.204(d), only allows attaching exhibits to appellate briefs for convenience if they are otherwise properly made part of the record.

Our review for prejudice is also hampered by the fact we have no pleadings and no record of the bifurcated court trial concerning other claims Alhanati had against Akhavan. Following the court trial, Alhanati was in fact awarded damages of \$265,744 against Akhavan. We simply have no way of knowing if those damages are the same damages he could have recovered on the causes of action resolved in Akhavan’s favor.

Alhanati claims he was prejudiced because there was no evidence to support a defense verdict on the breach of contract, fraud, and misrepresentation causes of action other than exhibit 20 (and Akhavan’s testimony concerning it). This is essentially an invitation to review the sufficiency of the evidence. In his brief, Alhanati

presented us with a completely one-sided version of the evidence. He discussed only the facts favorable to his case, and he completely omitted any discussion of any other evidence that supported Akhavan. It is a fundamental rule of appellate procedure that all material evidence on that question must be set forth in the appellant's briefs, and not merely appellant's own evidence. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) In light of Alhanati's failure to set forth fairly all the evidence supporting the defense, his argument is waived. Furthermore, we have reviewed the entire record, and cannot say that Alhanati was prejudiced by the admission of the inspection record. We note the trial court, in allowing the document in, questioned whether it even had any evidentiary value ("I don't know the value of it, but I will permit it"). The document is nothing more than a checklist showing that at various times a city inspector conducted inspections and "signed off" on certain stages.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.